Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MACRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLEE'S PETITION FOR REHEARING

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

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HONORABLE GUS J. SOLOMON, District Judge.

To The Honorable HOMER T. BONE and WM. E. ORR, Circuit Judges, and the Honorable EDWARD P. MURPHY, District Judge, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellee respectfully petitions the court for a rehearing of this appeal and for a reconsideration of the

modification made by it in the judgments of the District Court for Oregon. Appellee respectfully submits that the court failed to consider applicable common law rules and statutes of the State of Oregon in holding that the assets of a labor union may not be reached under Oregon law by one who has been wronged by the union.

QUESTION PRESENTED

In modifying the judgment of the District Court for Oregon in this case, the Court of Appeals has placed beyond the reach of an injured party all property and moneys of labor unions and unincorporated associations in Oregon. This court in modifying the judgment held that under the law of Oregon a labor organization cannot be sued as an entity and, even though judgment is obtained against all of its members as a class, the judgment cannot be enforced against the property of the labor organization. We cannot believe that this court intended such a radical departure from long-established principles of law.

In each of these cases the District Court rendered a final decree awarding appellee damages against certain individual union members who had been served, each member of the union (those served being found to be proper representatives of all) and the union itself. The District Court further decreed that execution issue against the individual property of the individuals served and against any property held by the union or for the use and benefit of the members of the union, whether

held in the name of the association or by others for it, but denied execution against the individual property of any member not served.

This court sustained the award of damages against the individuals served and each member of the unions, likewise finding proper representation of all; but reversed the judgment against the unions. Likewise, this court affirmed execution against the individual property of those served but denied execution against property held by the unions and for the collective use and benefit of their members.

This case was decided under Oregon law, which concededly governs to the extent jurisdiction is based on diversity. The question thus presented is: Does the law of Oregon require that one who has been injured by a union may not recover judgment against that union and collect the damages it has suffered from the assets of the Union, even though millions, but rather must seek such damages where it may find them among the individual assets of the union's members, however small?

I. The Oregon Courts have never had to determine whether an unincorporated Labor Union and its collective assets may be held for its torts. That question is presented in these cases from the Oregon District Court, based on diversity of citizenship, and this Court must determine it in the light of all pertinent data, including Oregon Statutes and cases from other jurisdictions.

In reversing the District Court's negative answer to the question presented, this Court relied upon the fact that the Oregon Courts have never affirmatively adopted the rule of the CORONADO case, *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1922), and that the legislature of Oregon has never specifically provided that a labor union may be sued as an entity. We concede that. But that is not the question. No attempt was made here to sue the union as an entity in its name. The case is based on diversity of citizenship and, even where an association is recognized as an entity suable in its name, it has no citizenship for purposes of diversity other than that of its members. The suits here are class suits brought against proper representatives of all of the members of each of the unions involved. The determinative citizenship is that of these representatives. See, e.g. *Ketcher v. Sheet Metal Workers' International Ass'n.,* 115 F. Supp, 802, at 811 (E.D. Ark., W.D., 1953).

We emphasize that it was for the purposes of diversity and not because of any doubt that unions are suable as entities in Oregon that the class suit was adopted in these cases. The Supreme Court of Oregon

has never held that an unincorporated labor union may not be sued as an entity in its own name. *Cousins v. Taylor,* 115 Oregon 472, 239 Pac. 96, 1925, was not an action against an association in its name. The language in that case to the effect that associations may not be sued as entities is dictum. Moreover, in its opinion the Supreme Court emphasized,

> "* * * * * * since this association was not a legal entity and there is no statute in this state authorizing such an organization, or defining the duties, powers and liabilities of the members of such an association when voluntarily formed, the association could neither sue nor be sued, and as such it had no capacity to enter into a contract or to appoint an agent for any purpose. Therefore a contract entered into in the name of the association or in its behalf, by any of the officers or members of the association would not be binding upon the association or enforceable against it." (115 Or. at 476)

This is not the case with unincorporated labor unions, which, as we shall point out, are specifically authorized by Oregon statute. Furthermore the Oregon Supreme Court has specifically recognized the contractual powers of an unincorporated union, *Carpenters Union v. Bachman,* 160 Ore. 520, 86 P. (2d) 456 (1939). In the only Oregon Supreme Court case to even mention the question of the suability of labor unions as entities, *Lonsford v. Burton,* 200 Ore. 497, 267 P. (2d) 208 (1953), the Supreme Court of Oregon specifically reserved and did not pass on that question.

We submit that were that question today presented to the Oregon courts, they would hold such unions

suable as entities. Indeed, the Honorable James Alger Fee, while Chief Judge of the United States District Court for Oregon, specifically so held in a diversity case, *Hawaiian Pineapple Company, Ltd. v. International Longshoremen's and Warehousemen's Union,* Civil No. 5183 (1951).

It is unnecessary, however, for the Court here to decide whether unions may be so sued. The question is whether judgment may be had against them and their collective assets reached and held for the wrongs committed by them where jurisdiction over the union is obtained in a class suit or action. In determining what the Oregon courts would hold in that respect, there being no opinion of the Supreme Court of the State of Oregon on that question, the Federal Courts in a diversity case should look to all pertinent data, including cases from other jurisdictions and Oregon statutes, *Stentor Electric Mfg. Co. v. Claxon Co.,* 125 F. (2d) 820 (1942, CCA 3).

II. An unincorporated Labor Union and its collective assets are liable for its torts even in those jurisdictions where it may not sue or be sued in its collective name, so long as all its members have been properly joined as defendants in a class suit or action, as they were here.

Long prior to the adoption of the *Coronado* rule and in the absence of any statute, courts held that a union's assets might be reached in a suit or action for damages brought against it by serving individuals as representatives of all its members.

In *St. Germaine v. Bakery and Confectionary Workers,* 97 Wash. 282, 166 Pac. 655 (1917) the Supreme Court of Washington specifically reached that conclusion. As in these cases, the suit there was for an injunction and damages for wrongful picketing. The specific question here involved was decided by that court as follows:

> "In the decree, the costs were awarded against certain of the respondents, but not against the unions, which were really the instigators, and controlled the picketing and caused the damage in the case. It is argued by the respondents that costs cannot be awarded against the unions, because the unions are not incorporated bodies, but are mere voluntary associations. It is alleged in the complaint that these unions are voluntary organizations, that the membership thereof is in the neighborhood of 500, and is so large that it is impracticable to bring all the members thereof before the court, and the officers, therefore, only, are made parties, without bringing all of the members of the unions before the court. In the case of Branson v. Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354, a Nevada case, it was held that, in an action in equity against a voluntary unincorporated organization, where the members comprising the same were numerous, such organizations might be made parties to an action, where a few of the members thereof were made defendants for the purpose of representing the organization, and, in that case, it was held proper to enter judgment against the organization as well as against the individual parties who were named as defendants in the case. That case is a learned discussion of the question, and, we think, is conclusive. It became the duty of the court, therefore, to enter a judgment for damages and costs against all of the respondents." (166 Pac. at 669).

In the even earlier case of *Branson v. I. W. W.*, 30 Nev. 270, 95 Pac. 354 (1908), referred to in the above quotation, the Supreme Court of Nevada upheld an attachment against union assets in a class action. The court there specifically recognized that voluntary unincorporated associations could not sue or be sued in their names alone; but recognized that they could sue or be sued by joining in all of their members, either in fact or through a class proceeding against proper representatives. It was argued in that case that the class suit could not be applied to an action for damages. The court held that a Nevada statute providing for the class procedure in a code which abolished the common law forms of action made such procedure applicable to actions at law as well as suits in equity. Oregon has such a code and such a specific provision for class proceedings. See ORS 13.170 (formerly OCLA § 9-106), quoted in appellee's prior brief at page 38.

Finally we again call the Court's attention to *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 148 F. (2d) 403 (1945, CCA 4); 163 F. (2d) 289 (1947, CCA 4). In its opinion, the Court distinguished that case as coming within Rule 17, F.R.C.P. and the *Coronado* rule, because of a Federal question involved. We emphasize again that that case was not a suit against a union as an entity. The Court specifically held that service on the union as an entity was not adequate; but affirmed the recovery of damages against the union on the basis of a class suit.

All of these cases simply recognize that an unincorporated labor union is nothing more than the sum of

its members. It is semantics not substance to consider the class name as something apart from the class. Where it is proper to enter judgment against every member of the union after a finding that those sued are proper representatives of all and that the wrong was committed by all, it cannot be the law that judgment may not be had against the union and made collectible out of its assets. In this connection, it should be noted that the courts, independent of statute, long ago held firm assets liable on a judgment against members of a partnership, although partnerships could not be sued as entities, but only by joining all of the members as parties.

Thus, in 47 C.J., Partnership § 554, at page 1013, we find:

> "At common law a judgment against the members of a firm for a firm debt is binding on the partnership property and also on each partner's individual property."

Surely there is no reason to apply a different rule to an unincorporated labor organization. Like a partnership, it is formed to promote the economic well-being of its members. Even more than a partnership in the modern community, it may accumulate vast assets and wield tremendous power. When that power is brought to bear to the damage of an innocent party, surely the assets which contribute to the power should be available for compensation of the wrong.

III. Oregon Statutes declare unincorporated Labor Unions legal, specifically regulate their property rights and recognize that they may be held liable in damages.

Apart from common law and common sense reasons for making the assets of a union available to those wronged by it, a reading of the Oregon Statutes indicates a legislative intent to provide such liability. Chapters 661 and 662 ORS (formerly OCLA Chapter 102) contain many provisions dealing with labor unions. Their legality is recognized, ORS 661.010. The property rights of unincorporated organizations and associations in the labor field are specifically regulated by ORS 661.040, which requires such organizations and associations to keep books of all their receipts and expenditures and to be accountable to their members. The right to the union label is set forth and a right of damages for infringement given the union, ORS 661.210 through 661.280.

Even more significant, the Oregon Code specifically recognizes the liability of such associations. ORS 662.-070 (formerly OCLA 102-915) provides as follows:

> **"Liability of associations and officers and members of associations for unlawful acts of individuals.** No officer or member of any association or organization *and no association or organization* participating or interested in a labor dispute, shall be held responsible or liable in any court of this state for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis added).

This provision is contained in the Oregon Little Norris-LaGuardia Act. It is, however, not confined to injunctions, but deals with liability. It clearly recognizes that a labor association may have a liability apart from the individual liabilities of its members, under circumstances found in this case both by this Court and that below.

IV. Under either Federal Maritime Law, which we think applicable, or the Taft-Hartley Law, which appellants argue applies, appellee is entitled to judgments against the Unions, enforceable against their collective assets.

As the Court found, the picketing of appellants was clearly unlawful under Oregon law, (*Schwab v. Moving Picture Machine Operators,* 165 Ore. 602, 109 P. 2d 600 (1941) (Discussed in our prior brief, at pp. 24-28); *Markham and Callow v. Inter. Woodworkers,* 170 Ore. 517, 135 P. (2d) 727 (1943) (Picketing to force rehire of employees discharged for violation of contractual obligation held unlawful, 170 Or. at 575).

So far we have discussed the case on the theory on which it was decided. We should point briefly to the other theories advanced by the parties.

In its decision the Court ignored appellee's principal argument (see Appellee's Brief, particularly at pages 27-29) that the conduct of the unions was for a purpose also declared unlawful by Federal Maritime law. Even if the court were correct in holding a federal question necessary to a judgment against a union sued by class procedure, as in its interpretation of the *Turnstall* case,

supra, such a question was here involved by violation of these maritime rights of appellee.

Finally, should appellants be correct in their argument that appellee pleaded and proved a case under the Taft-Hartley Act, judgment against the unions would be proper. That the right granted by the Taft-Hartley to sue unions as entities did not abolish the right to sue them by class action, see *Tisa v. Potofsky,* 90 F. Supp. 175 (S.D. N.Y., 1950); *Ketcher v. Sheet Metal Workers,* supra.

CONCLUSION

We respectfully submit that the Court erred in holding that judgment may not be entered against an unincorporated labor union and that its collective assets may not be reached by one who has been damaged, as here, by the actions of the union, deliberately taken and fully authorized by the membership. Nothing in equity, which is the source of the class proceeding here used, supports this monstrous result, which deprives the one wronged of any remedy or forces him to seek it in an unequal and inequitable manner against the assets of a few of the many who participated in the wrong. Nor does anything in Oregon law support such an unrealistic result. Common sense forbids it.

We respectfully pray that the Court withdraw its modification of the judgments entered in these cases by

the District Court for the State of Oregon, which should in all respects be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

CERTIFICATE

I hereby certify that I am one of counsel for appellee; that I prepared the foregoing petition for rehearing, and in my judgment it is well founded. I further certify that said petition is not interposed for delay.

Dated at Portland, Oregon, May 1, 1956.

JOHN D. MOSSER
of Counsel for Appellee